No. 12307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARL W. TAYLOR,

Petitioner-Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent-Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant on May 20, 1949, filed in the United States District Court of the Western District of Washington, Southern Division, his petition for a writ of habeas corpus, praying to be released from his alleged premature imprisonment on McNeil Island, for the

lleged reason and upon the alleged grounds that such remature imprisonment interfered and denied to him ne free exercise of his right to prosecute his timely nd yet undetermined appeal from his conviction in ne United States District Court for the Northern istrict of California, Southern Division, wherein are is witnesses, evidence, records and other proofs, as ell as his law books and briefs, such curtailment in is opinion amounting to a denial of due process and ontrary to and in violation of the fifth amendment o the United States Constitution. (Tr. 1-4).

Thereafter, the District Court having determined ne issue to be one of law, and not of fact (Tr. 6), nd that the same should be resolved against the ppellant, on its own motion, entered an order deny-ng appellant's petition and dismissing the action. Tr. 5-7). From that final order the appellant has een permitted to appeal. (Tr. 8-17).

The facts material to a determination of appel-ant's right to discharge from present confinement, s disclosed in the record, may be summarized as ollows:

Appellant was sentenced in the United States District Court for the Northern District of California, outhern Division, and thereafter on April 25, 1949, iled his appeal in that court, which is now pending,

not having been ruled on as yet. That on April 27, 1949, he was committed to the United States Penitentiary at McNeil Island, Washington, where he is now confined pursuant to said judgment and commitment. (Tr. 1-3). The record is devoid of any allegation or showing upon the matter of an election to, or not to commence service of sentence.

QUESTION PRESENTED

Does an appeal, filed April 25, 1949, from a conviction in a federal court and sentence to a penitentiary, stay execution of such sentence in the absence of an election not to commence service or admission to bail?

ARGUMENT AND AUTHORITIES

The law involved in this proceeding is found in Rule 38 of Federal Rules of Criminal Procedure following Sec. 687, Title 18, U. S. Code, the pertinent portion of which reads as follows:

> Rule 38, Stay of Execution, and Relief Pending Review.
>
> *(a) Stay of Execution.*
>
> * * * *
>
> (2) *Imprisonment.* A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence

service of the sentence or is admitted to bail.

The effective date of the foregoing rule is March 21, 1946, and this rule was in effect at the time of the judgment and sentence.

See *Tilghman v. Hunter*, 168 F. (2d) 946.

Appellant seeks to bring his case under the terms of the former Rule 5, Rules of Criminal Procedure, because he alleges that the crime for which he was convicted occurred in February, 1946, and that he is subject to the rules and laws in effect at the time of the commission of the crime. (App. Brief 3). This, appellant assumes to be true whether it relates to substantive rights or to matters of procedure effective at time of sentence, but not at time of commission of crime.

See *Baker v. Hunter*, 142 F. (2d) 615.

Rule 38 supra, has shifted the burden of proof where it justly belongs. Too many petitioners, as the reported decisions disclose, have later laid claim to time served in jail pending appeal, because it was incumbent upon the government to disprove the claim later made by the petitioners that they had once upon a time notified some obscure jailer that they elected to commence service.

Flynn v. Squier, Cause No. 747, United States District Court, Western District of Washington, Southern Division, decided February 15, 1945, unreported.

See Contra, *Demarois v. Hudspeth*, 99 F. (2d) 274, where the court refused to allow petitioner credit for time in jail. It is appellee's contention that former Rule 5 deserves to be neither re-invoked nor reinstated.

CONCLUSION

For the foregoing reasons, we contend the decision below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.